FILE COPY.

Office Supreme Court, U. S.
FILED.
OCT 29 1906
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1906.

NO. 78.

THE TEXAS & PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

VERSUS

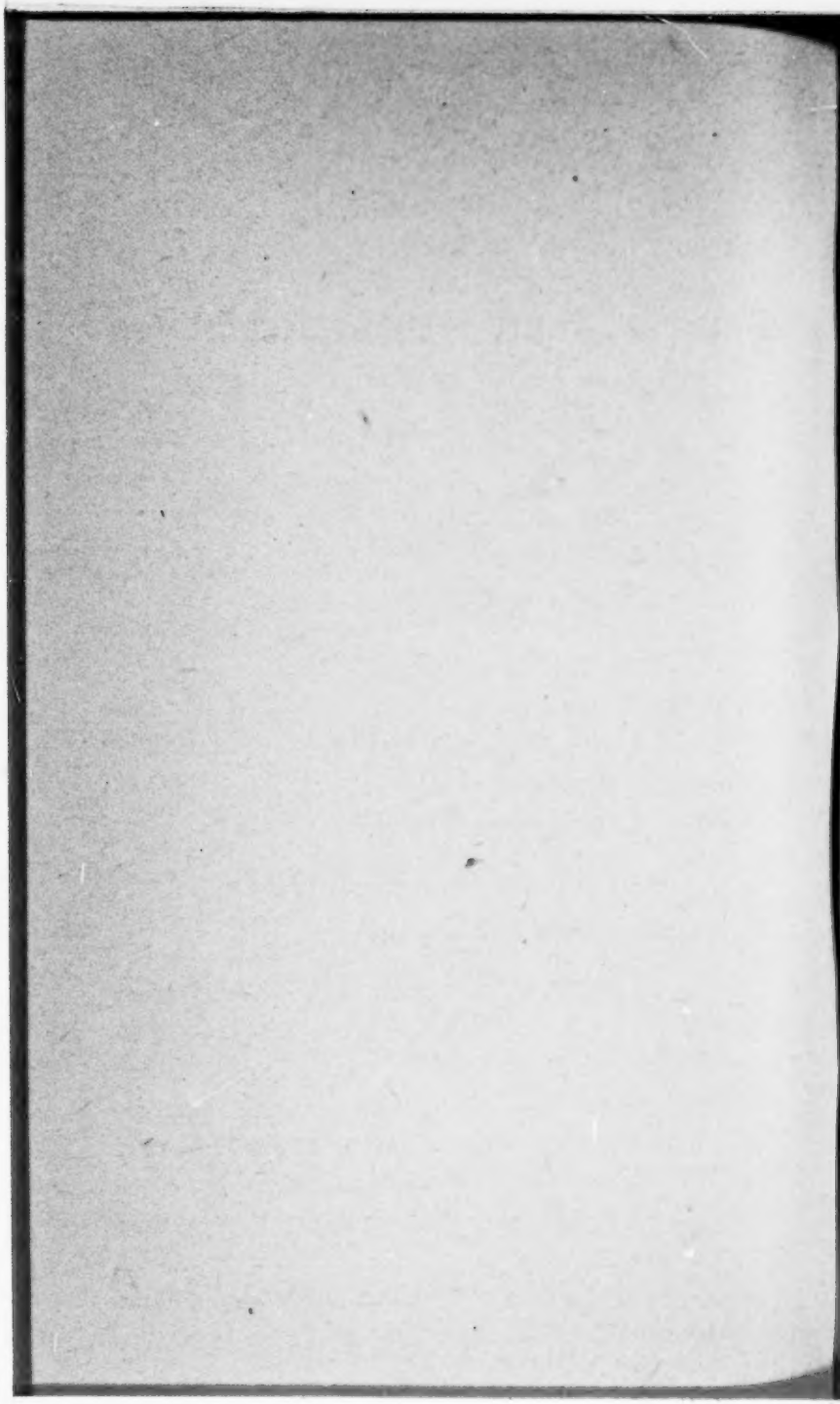
THE ABILENE COTTON OIL COMPANY,
Defendant in Error.

In Error to the Court of Civil Appeals for the Second Supreme Judicial District of the State of Texas.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN F. DILLON,
WINSLOW S. PIERCE,
DAVID D. DUNCAN,
THOMAS J. FREEMAN,
For the Railway Company.

J. G. Hauser, "The Legal Printer," 402 Camp St., N. O., La.



Supreme Court of the United States

OCTOBER TERM, 1906.

THE TEXAS & PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

VERSUS

THE ABILENE COTTON OIL COMPANY,
Defendant in Error.

In Error to the Court of Civil Appeals for the Second Supreme Judicial District of the State of Texas.

BRIEF FOR PLAINTIFF IN ERROR.

The original petition in this suit was filed in the District Court of Taylor County, Texas, October 14, 1901, and in August, 1903, an amended petition was filed, the amended petition taking the place of the original petition under the Texas practice. The cause of action, as stated in said amended petition, was in substance as follows:

That in September and October, 1901, the defendant in error purchased a large amount of cottonseed at various-named places in the State of Louisiana, and said

seed was shipped to defendant in error from said Louisiana points, consigned to the defendant in error at Abilene, Texas, and that said seed was shipped to the defendant in error at Abilene, Texas, over the line of road of the Texas & Pacific Railway Company, which operates a line of road from New Orleans, in the State of Louisiana, to El Paso, in the State of Texas, Abilene being a point intermediate. It was further alleged in said amended petition that a reasonable rate from the points named in Louisiana to Abilene were rates varying from twenty-five cents per one hundred pounds to twenty-eight and three-fourths cents per one hundred pounds, but that the plaintiff in error, the Texas & Pacific Railway Company, charged and collected for the transportation of the seed a rate of sixty-seven cents per one hundred pounds. It further alleged that said sixty-seven-cent rate was unreasonable, but that the defendant in error was required to pay same in order to get possession of the seed; and it sues for the difference between the reasonable rate of from twenty-five to twenty-eight and three-fourths cents per one hundred pounds and the alleged unreasonable rate of sixty-seven cents per one hundred pounds, which was charged and collected by the plaintiff in error, the difference in the amount being the sum of $1,951.83.

Plaintiff in error answered by special exception to the effect that the defendant in error could not maintain this suit, because, under the allegations in its petition, it showed that, if it had any cause of action, said cause of

action could only be prosecuted in some United States Court of competent jurisdiction, and not in a State Court, or by proper complaint filed before the Interstate Commerce Commission of the United States. Plaintiff in error also answered by general denial, and by special answer, in substance, as follows: That at the time, and prior to the time, of the shipments as alleged in defendant in error's First Amended Original Petition, plaintiff in error had promulgated, published and posted its schedule of rates, wherein and whereby it adopted, published and posted the rate provided for transporting and carrying cottonseed in carload quantities, subject to minimum rates from the points mentioned in defendant in error's petition, to Abilene, Texas, and that said schedule of rates published and posted by plaintiff in error, in accordance with the provisions of the Interstate Commerce Act, from said points to Abilene, Texas, was sixty-seven cents per one hundred pounds, and was a through rate adopted and posted by the plaintiff in error in accordance with the provisions of the Interstate Commerce Law; that the shipments described in defendant in error's First Amended Original Petition were interstate shipments; that, having filed, published and posted said rates in accordance with the Interstate Commerce Law, plaintiff in error was not authorized to, and could not in accordance with the law, legally demand or collect from defendant in error a greater or lesser rate for the transportation of said cottonseed from the points mentioned in the First Amended Original Petition than the sum of sixty-seven cents per

one hundred pounds, as was provided in the schedule of rates adopted, published and posted in accordance with the Interstate Commerce Law; that said sixty-seven-cent rate was filed, published and posted in accordance with the provisions of the Interstate Commerce Law prior to the time of the shipments made by the defendant in error, as alleged in its First Amended Original Petition, and was in full force and effect, and no other rate than sixty-seven cents per one hundred pounds could have been charged for the transportation of said cottonseed, and the sixty-seven-cent rate was the legal rate in effect for the transportation of said cottonseed, and no other rate. (See Printed Record, pp. 6-8.) It further denied that said rate was exorbitant or unreasonable.

The case was tried by the Court without a jury, and on the 16th day of April, 1904, the Court rendered a judgment in favor of the plaintiff in error. After its finding of fact, the Court found the following conclusions of law:

> "1. The facts so found show that this was an interstate shipment.
>
> "2. The facts so found show that the plaintiff in error complied with the Interstate Commerce Law, and said rates and classifications were thereby properly established and in force; but the rate charged on cottonseed in carload lots was unreasonable and excessive.
>
> "3. I find that the rate charged by the defendant was that established under the Interstate Commerce Law, and I find for the defendant."

The judgment was accordingly entered in favor of the defendant, the Texas & Pacific Railway Company.

The defendant in error filed its appeal bond and statement of facts in due time, and the case was regularly appealed to the Court of Civil Appeals for the Second Supreme Judicial District of the State of Texas. The case came on regularly to be heard in the Court of Civil Appeals, which Court, on the 25th day of February, 1905, handed down its opinion, reversing the judgment of the District Court of Taylor County, Texas, and rendering judgment in favor of the defendant in error, and against this plaintiff in error, for the sum of $1,951.83, with legal interest from October 7, 1901, and all costs. The plaintiff in error filed its motion for rehearing in said Court of Civil Appeals, which motion in due course was overruled, and the plaintiff in error, within the time required by law, made its application for writ of error to the Supreme Court of the State of Texas, which writ of error was refused. From the judgment of the Court of Civil Appeals, it being the highest Court to which the cause could be taken, the Texas & Pacific Railway Company has sued out its writ of error to this Court.

Assignments of Error.

1.

The allegations in the petition filed in the District Court of Taylor County, Texas, by the defendant in error, the Abilene Cotton Oil Company, and the testimony offered on the trial of said cause, showed that the shipment of

cottonseed was made over the line of the Texas & Pacific Railway Company from certain points in the State of Louisiana to a point in the State of Texas, and that same was an interstate shipment; and it, therefore, followed that any suit to recover damages, on account of any excessive, unreasonable or unjust freight charge made and collected by the Texas & Pacific Railway Company for the transportation of said shipment, was wholly within the jurisdiction of a Circuit Court of the United States; and that the District Court of Taylor County, Texas, had no jurisdiction to hear and determine the cause.

2.

The said Court of Civil Appeals erred in reversing the judgment of the District Court of Taylor County and rendering a judgment against the plaintiff in error, for the reason that there was a want of power in the District Court of Taylor County to assume jurisdiction over the subject matter of this suit, and the Congress of the United States had prescribed the method of procedure, and no Court save a District or Circuit Court of the United States had the jurisdiction to hear and determine the matters involved.

3.

The said Court of Civil Appeals erred in adopting the conclusions of fact found by the trial Court, and in rendering a judgment against this plaintiff in error, which action was erroneous, in that said trial Court held that the freight charges collected and received were unreasonable

and excessive, when in fact there was no evidence to sustain such findings and judgment of the Court.

4.

The trial Court held that the Texas & Pacific Railway Company had complied with the terms and provisions of the Act of Congress of February 4, 1887, entitled, "An Act to Regulate Commerce," and known as the "Interstate Commerce Act," with reference to the making, filing and publication of its tariff rates as applied to the shipment involved in this suit; and further held, as a conclusion of law, that the Texas & Pacific Railway Company was entitled to collect and receive the amount shown by this tariff rate—to-wit, sixty-seven cents per one hundred pounds.

It says that the said Court of Civil Appeals erred in not sustaining the holding of the said trial Court in this respect, and in rendering a judgment against the plaintiff in error based upon a freight rate lower than that fixed by the said published tariff rate.

5.

It says that the judgment of the District Court of Taylor County was correct, and the Court of Civil Appeals erred in reversing said judgment and in rendering a judgment against this plaintiff in error, for the reason that it appeared that the shipment involved was an interstate shipment, and that the Texas & Pacific Railway Company had fully complied with the acts of Congress and all the provisions of the act approved February 4, 1887, entitled "An Act to Regulate Commerce,"

and that, under and by virtue of the provisions of the said act and the tariff rates which had been regularly promulgated, it was entitled to receive and collect the amount it did—to wit, sixty-seven cents per hundred pounds; and neither the District Court of Taylor County, Texas, nor the said Court of Civil Appeals, upon appeal, had power to hold that said rate was unreasonable or unjust, or to fix and determine what was a reasonable and just rate, and render a judgment for the difference.

6.

It says that the judgment of the said Court of Civil Appeals is repugnant and in conflict with the laws of the United States, and especially with those several acts of Congress of the United States commonly known as "An Act to Regulate Commerce," approved February 4, 1887, and acts amendatory thereto, especially Sections 8 and 9 of said act, approved February 4, 1887.

7.

The said Court of Civil Appeals erred in reversing the judgment of the District Court of Taylor County, and in rendering a judgment against this plaintiff in error, because said judgment of the said Court of Civil Appeals is repugnant to, and in conflict with, and is contrary to, and in violation of, and in contravention with, the statutes of the United States with reference to the regulation of interstate commerce and provisions therein claimed.

8.

The said Court of Civil Appeals erred in rendering any judgment herein against plaintiff in error, because there

were drawn in question the construction and application of the statute of the United States, under which plaintiff in error claimed a right, title, privilege and immunity, and the decision of the said Court of Civil Appeals was against the right, title, privilege and immunity thus set up and claimed by plaintiff in error.

9.

The said Court of Civil Appeals erred in holding that, although the regular published tariff rate under the terms and provisions of the Interstate Commerce Act was sixty-seven cents per hundred pounds, and which amount the said plaintiff in error collected, yet the said Court, as well as the District Court of Taylor County, had the jurisdiction and power to set aside said regular published tariff rate, and to hold that same was unreasonable and unjust, and to hear and determine what was a reasonable and just rate to be charged, and to render a judgment for any unreasonable and excessive amount charged and collected.

10.

The interpretation placed on the Interstate Commerce Act by the said Court of Civil Appeals for the Second Supreme Judicial District of Texas is contrary to, in violation of, and in contravention with, the statutes of the United States as to the regulation of interstate commerce.

BRIEF.

There are two Federal questions raised in this case, both of which were specifically set up and claimed by the Texas & Pacific Railway Company in the court below, as fully appears in the record. (See answer of the Texas & Pacific Railway Company, Tr., pp. 6, 7 and 8, setting up its alleged rights under the Interstate Commerce Act.) One of these Federal questions is to the effect that the defendant in error's cause of action, if any it had, exists by virtue of a law of the United States—to wit, the Interstate Commerce Act of Congress, entitled, "An Act to Regulate Commerce," approved February 4, 1887—and that, by the terms of said act, a cause of action such as is alleged by the defendant in error could only be enforced in the United States Courts having jurisdiction or before the Interstate Commerce Commission, as provided by said Act to Regulate Commerce, approved February 4, 1887, and amendments thereto, and that such a cause of action as defendant in error alleged in his petition could not be maintained and enforced in a State Court. This question was decided against the plaintiff in error.

The second Federal question was to the effect that the only lawful rate that the plaintiff in error could charge for transporting the cottonseed was that set forth in its duly-filed, published and posted tariff, in accordance with the Act to Regulate Commerce, approved February 4, 1887, and amendments thereto, and that this rate was sixty-seven cents, and was the rate charged, and the only

lawful rate that could be charged, by the plaintiff in error. This question was raised and decided against the plaintiff in error by the Court of Civil Appeals. The judgment of the said Court of Civil Appeals was and is the final judgment of the highest Court in the State in which a decision in this case can be had. That said decision of the Court of Civil Appeals is repugnant to, and in conflict with, the laws of the United States and the Interstate Commerce Act, and especially Section 8 and Sections 9 and 10 of the said Act to Regulate Commerce, approved February 4, 1887. The plaintiff in error claimed title, right and immunity under and by virtue of the said act, and there were drawn into question the construction and application of the said act, and the decision of the said Court of Civil Appeals was against the right, title and immunity claimed thereunder.

There is no disputed question of fact in the record. The facts as alleged in plaintiff in error's answer were found to be true, both by the District Court of Taylor County and by the Court of Civil Appeals, Second Judicial District. (See Record, pp. 30 and 37.) There are two questions involved in this case as before set out:

1. Could the defendant in error maintain a suit of this kind in the State Courts?

2. Does a cause of action lie against a railway company for the difference between the legal rate printed, published and posted in accordance with the provisions of the Interstate Commerce Act and a lower rate alleged to be a reasonable rate by a shipper of interstate freight,

the lower rate not having been printed, published and posted in accordance with the Interstate Commerce Act, but to be determined by the judgment of a State Court?

We submit the following propositions of law as decisive of the first question raised:

1. If an Act of Congress gives a right to a party aggrieved without specifying a remedy, it might be enforced in a State Court; but, if a right is conferred by statute and a specific remedy provided, or a new power and means of execution granted, the right can be enforced only in the mode provided in the act.

2. A party who seeks damages alleged to have been sustained in consequence of a violation by a common carrier of the Interstate Commerce Law, as the act provides for redress by a procedure either before the Commission or by suit in a Federal Court, cannot bring suit before a State Court, which is without jurisdiction to enforce the right, but is relegated exclusively to the Commission or Federal Court; otherwise, the party would have a third alternative or mode of redress not contemplated by the act. He is restricted to one of two remedies.

3a. Where a right arises under the laws of the United States, Congress may, if it sees fit, give to the Federal Courts exclusive jurisdiction.

3b. When a right is given by statute, and a specific remedy provided, or new power, and also the means of execution, the power can be executed, and the right vindicated, in no other way than that prescribed by the act.

3c. **The Interstate Commerce Act providing that remedies thereunder must be sought in the Federal Courts or before the Interstate Commerce Commission, but not in both, by necessary implication excludes the idea of jurisdiction in any other tribunals. The act confers the right and provides the remedy and means of enforcement.**

Authorities under above propositions:

Interstate Commerce Act, February 4, 1887, and Amendments 1, Supp., R. S., p. 529, especially Secs. 8 and 9.

Frank T. Copp vs. L. & N. R. R. Co., 43 La. 511-514.

G. C. & S. F. vs. Moore, 83 S. W. 362.

Van Patten vs. Chicago, M. & St. P., 74 Fed. 981.

Ex Parte McNeil, 13 Wallace, 236.

Gilman vs. Philadelphia, 3 Wallace, 713.

Swift vs. Philadelphia R. R. Co., 58 Fed. 858.

Claflin vs. Houseman, 93 U. S. 130 (see p. 137.)

The Moses Taylor, 4 Wallace, 411, 425 to 431 for opinion.

Story on the Constitution, Secs. 436-447.

We submit the following propositions of law as decisive of the second question raised:

The only lawful rate that can be charged and collected by common carrier upon an interstate shipment is the legally-filed, published and posted rate under the Act to Regulate Commerce, and no cause of action for damages or otherwise will lie against a carrier for collecting its duly-published, filed and posted rates. If this rate be unreasonable, the only remedies the shipper has are those provided in Section 9 of the Interstate Commerce Act. By the terms of the Interstate Commerce Act, and espe-

cially Section 2, it is illegal for either a corporation or person to give or receive any rebate, concession, etc., and declaring same to be unlawful, and the person or corporation so doing to be guilty of a misdemeanor. By Sections 6 and 10 of the Interstate Commerce Act, approved February 4, 1887, it is provided that it shall be a misdemeanor and unlawful, punishable by a fine, for any person, persons or corporations to grant, give or solicit, accept or receive, any rebate or concession in respect to the transportation of property in interstate or foreign commerce, whereby any such property shall be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to Regulate Commerce and the acts amendatory thereof.

Authorities:

Texas & Pacific Ry. Co. vs. Mugg & Dryden, 202 U. S. 242.

Hefley vs. Railway Co., 158 U. S. 98.

Southern Ry vs. Harrison, 119 Ala. 539.

M. K. & T. Ry Co. vs. Trinity Lumber Co., 1 Tex. Civ Appeals, 553.

Texas & Pacific Ry. Co. vs. Clark, 4 Tex. Civ. Appeals, 611.

M., K. & T. Ry. Co. vs. Stoner, 5 Tex. Civ. Appeals, 50.

Dillingham, Etc., vs. Fischel, 1 Tex. Civ. Appeals, 546.

S. A. & A. P. Ry. Co. vs. Clements, 20 Tex. Civ. Appeals, 498.

Act of Congress entitled "An Act to Regulate Commerce," approved February 4, 1887. 1st U. S. Statutes 529 and amendments thereto.

ARGUMENT.

Under the first propositions of law to the effect that the State Courts have no jurisdiction to entertain a suit of this character, we respectfully submit that this is a question of more than passing interest; that the decision of same goes to the very foundation of the Act to Regulate Commerce, known as the "Interstate Commerce Act"; that, should this Court hold that a suit of this nature could be maintained in the various courts of the States, the practical effect of such a decision would be to annul and make inoperative the principal features of the Act to Regulate Commerce; and, so far as the practical workings of the Act to Regulate Commerce are concerned, it would render it nugatory and of no effect. The Act of February 4, 1887, known as the "Interstate Commerce Act," and the amendments thereto, had in view, not the regulation of interstate commerce in a general way, but the specific purpose of regulating the rates, rules and fares that should govern the movement of interstate commerce, and the act treats the subject of such legislation as a whole, and has attempted to cover the entire field of such regulation. It provides, in express terms, as to what common carriers shall come within the purview of the act, and it then, in express terms, adopts as a part of the act, and practically adopts as a rule upon which the other provisions are based, the rule of the common law in effect as to compensation for services rendered by common car-

riers in the transportation of property. The last paragraph of Section 1 of the act provides as follows:

> "All charges made for any service rendered, or to be rendered, in the transportation of passengers or property, as aforesaid, or in connection therewith, or for the receiving, delivering, storage or handling of such property, shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

This is but an enunciation of the common law as applied to the transportation of passengers and property by common carriers. The act then further provides for the filing, publishing and posting of the rates, fares and charges of the common carrier, and provides that such filing, publishing and posting shall be necessary in order to make the rates on interstate commerce lawful. The only rates that can be legally charged by a common carrier for transporting interstate commerce are those that have been filed, published and posted in accordance with the Act to Regulate Commerce, and a severe penalty is provided under the original act. (See Section 10 of the Act to Regulate Commerce, approved February 4, 1887, as amended in 1889, and the Elkins amendments to said original act, approved February 19, 1903, which last act was amended by the last Congress, the amendment taking effect on July 29, 1906.) Both the original Interstate Commerce Act and the amendments thereto provide in detail what the carrier must do in order to make its rates, fares and charges legal. But both the act and the amendments thereto, after providing as to how a legal and law-

ful rate may be made by the carrier, does not leave the shipper or the public without a remedy to enforce the common-law rule adopted in this act—that such rates, fares and charges shall be reasonable and just. The act itself makes express provisions for relief against an unreasonable or unjust rate, and by express terms it provides the means and names the court and tribunal that may be resorted to by the shipper should he be dissatified with the rates, fares and charges that have been legally published, posted and filed by the railway company, and provides the means and the Court to test the reasonableness of such rates, fares and charges. Sections 8 and 9 of the Act of February 4, 1887, give to the shipper the right to attack any rate or fare for unreasonableness, and provide two tribunals, in either of which he may attack the rates, fares and charges as unjust and unreasonable. If he elects he may bring his suit to attack the unreasonableness of a rate, and for damages on account of being charged an unreasonable rate, in a Federal Court of competent jurisdiction. If he does not elect to sue for his damages in a Federal Court on the ground of the rate being unreasonable, he may file his complaint before the Interstate Commerce Commission, and attack the rate as unreasonable, and, upon the finding of the Interstate Commerce Commission that the rate is unreasonable, a suit could be instituted upon the equity side of the docket of the Federal Court to enjoin the carrier from further charging such unreasonable rate. In addition thereto, the Commission could

indicate in their report that the shipper was entitled to a fixed amount in reparation for his damages on account of the unreasonable rate, and the shipper could institute suit in a Federal Court of competent jurisdiction to enforce this finding of the Commission. The law, Section 9, expressly prohibits, however, the shipper from exercising both remedies, but forces him to elect as to which of the remedies he would resort to, and in both instances expressly fixes and provides the forum or tribunal in which his right must be asserted. Since the amendment of June 28, 1906, in the event of complaint to the Commission of the unreasonableness of a rate, the Commission, in addition to awarding him damages, could also fix by its order a rate to be charged by the carrier in the future, which the carrier would be forced to comply with or else enjoin same in the Federal Court. It can be seen from these provisions that the entire question of regulation of rates has been dealt with in detail. The rights of the shipper, the remedies of the shipper, the rights of the railway, and the remedies of the railway, and the rights of the general public, are all fully provided for and fully protected. The entire Interstate Commerce Act shows a perfect and complete plan in itself, and it is clearly not intended by the act that any of its provisions should be dependent upon the rule provided by any State statute, or by a rule or decision that might be laid down by any State Court. The act, by express provisions and by necessary implications, deprives the State Courts of any jurisdiction to grant relief or to adjudicate the questions

that might arise under and by virtue of the Act to Regulate Commerce, known as the "Interstate Commerce Act," and expressly deprives the State Courts of any jurisdiction or right to adjudicate and establish what is a reasonable and just charge for transporting interstate commerce; and the wisdom of the law is apparent upon its face, for, if this were not true, what a chaotic condition of affairs would exist! One shipper of interstate commerce in Texas might obtain a verdict of a jury, or a Justice of the Peace, to the effect that the legally-published, posted and filed rates on an interstate shipment were unreasonable. The Interstate Commerce Commission, at the instance of another shipper, might hold it reasonable, or a Federal Court might hold it reasonable. Or a Justice of the Peace in one county, or in one precinct, might hold a rate reasonable, while another Justice of the Peace, in the same county and in the same precinct, might hold it unreasonable, so that the reasonableness or unreasonableness of the legally-published rates on interstate commerce would depend upon the whim of a jury or Justice of the Peace. To further illustrate the unjustness of such a situation, I would call attention to the fact that in the State of Texas no appeal lies from a suit in a Justice's Court where the amount involved is less than $20. (Revised Statutes of Texas 1895, Article 1568 and Article 1158.) No appeal will lie from the County Court in the State of Texas unless the amount in controversy or the judgment rendered shall exceed $100 exclusive of interest and costs. (Revised Statutes 1895, Article 996.)

The officers who preside over the County and Justice's Courts in Texas are not required by the Constitution and laws of the State to be learned in the law; and the Supreme Court of Texas has held that no presumption would arise in cases tried before Justices of the Peace, or the County Court, where the amount was too small to appeal, that the law had not been correctly applied. (See *Railway vs. Dowe*, 70 Tex., pp. 6 and 10.) And yet, if this Court should hold that the State Courts have jurisdiction to try the question of the reasonableness or unreasonableness of interstate rates put in effect by the carriers under the Act to Regulate Commerce, these very Courts would be the ones that would try most of the cases, and no writ of error would lie to any Federal Court, for no Federal question exists, as they claim jurisdiction under the common law and not under a Federal statute. This state of affairs was never contemplated by the act, and we submit that every expression and every implication is against it. The learned Court of Civil Appeals seems to have given some weight to the provision of Section 22 of the Interstate Commerce Act, which is as follows:

> "Nothing in this act contained shall alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies."

We submit that it was not the intention of this provision to confer jurisdiction upon State Courts to enforce the provisions of the act, because the act specifically provides the Courts in which rights arising under the act

shall be enforced; but this paragraph is merely an announcement that whatever remedies that may have existed, either at common law or statute, might be resorted to to carry out the provisions of this act, and were not repealed by it. The Interstate Commerce Act prevents pooling by one provision—Section 7. It was not intended that the general statute of the United States, prohibiting unlawful combinations by pools or otherwise, should be repealed or interfered with in any way, nor the right to resort to injunction if necessary, nor the right to resort to any other remedy for wrongs or evils not specified or covered by the act; but, in the matter of attacking a rate as unreasonable, and in seeking damages therefor, the act is specific, and has provided a specific forum and tribunal. The next provision following the provision above quoted expressly confers upon the District and Circuit Courts of the United States jurisdiction for a violation of the law. The vice in the opinion of the Court of Civil Appeals of Texas in this case, and in the companion case of the *Texas & Pacific Railway Company vs. Cisco Oil Mills*, being Cause No. 79, is that the Court did not consider the fact that no new right was created by the Interstate Commerce Act in the shipper to sue for an unreasonable rate, but his right by the common law was embodied in a law of the United States, and a means and a Court for its enforcement provided; and whether or not the common law was in effect in the United States was of no importance whatever, for the reason that the Interstate Commerce Act itself expressly adopted the rule of

the common law, and has expressly provided that, in this class of cases, jurisdiction is confined exclusively to the Courts of the United States. If no provision had been made in the act for its enforcement in Courts of the United States, then there would have been some ground for the Court of Civil Appeals holding that it was a right that could be enforced in any Court, State or Federal, because there is no provision in the Constitution of the United States, nor in the laws made in pursuance thereof, prohibiting State Courts entertaining jurisdiction over matters arising out of interstate commerce; but, when a statute of the United States specifically provides the Court in which the right may be enforced, this is to the exclusion of the right to enforce the remedy in a State Court, and this is the distinction that the Court of Civil Appeals did not make. The very decisions upon which it relies to support its opinion—to wit, 62 Federal Reporter, page 24—expressly recognizes the rule announced above. The case of *Tift vs. Southern Railway*, 123 Federal Reporter, 790, recognizes the rule as announced above. The case of *Interstate Commerce Com. vs. N. O. & T. & P. Ry. Co.*, 167 U. S. 502, relied upon by the Court of Civil Appeals, is a direct authority in favor of the views of the plaintiff in error in this case. On page 505, in summing up the provisions of the Interstate Commerce Act, the learned Judge says:

> "3. Incorporating into a situation the common-law obligation resting upon the carrier—to make all of its rates reasonable and just—and directing the Commission to execute the provisions of the act," etc.,

showing that this Honorable Court has recognized that the common-law provision has been embodied in the statute. There is no contention, upon the part of the plaintiff in error, that the common-law provision has not been embodied in the statute, but there is a grave distinction between the embodying of the common-law provision in the statute, making the common law effective in the United States, and the giving to State Courts jurisdiction to enforce the rights conferred under the Interstate Commerce Act; and the learned Court of Civil Appeals failed to make the distinction between the jurisdiction of a State Court to enforce the common law and the question of a common-law right existing.

We earnestly submit that the Court of Civil Appeals erred in holding that the rights sought to be enforced in this suit could be enforced in a State Court, and this view is supported by the authorities cited in this brief.

As to the second proposition of law involved in the assignments of error, to the effect that no cause of action would lie against the plaintiff in error in a suit of this character, for the reason that the admitted facts show that the rate as charged by the plaintiff in error was the duly-published, posted and filed rate in accordance with the Interstate Commerce Act, we beg to submit that this is a question that is no longer open to discussion, as the same question was decided by this Honorable Court in the case of *Texas & Pacific Railway Company vs. Mugg & Dryden*, 202 U. S. 242, this Court holding that the legally-published, posted and filed rate of the carrier on interstate

shipments must be charged and collected, and that no agreement or arrangement or contract to the contrary would relieve it of this duty, and that no cause of action, either in contract or damages, would lie against it for having complied with its duty in this respect. As before stated herein, the shipper had his remedy, which he could have asserted either in a court of competent jurisdiction—to wit, a Federal Court—or before the Interstate Commerce Commission.

For the errors assigned, we respectfully ask that the judgment of the Court of Civil Appeals be reversed and the cause remanded, with instructions to render judgment in behalf of the Texas & Pacific Railway Company.

JOHN F. DILLON,
WINSLOW S. PIERCE,
DAVID D. DUNCAN,
THOMAS J. FREEMAN,

Counsel for the Texas & Pacific Railway Company.